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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

In re:
USA CAPITAL REALTY ADVISORS, LLC,

Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,

Debtor.

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

In re:
USA SECURITIES, LLC,

Debtor.

Affects:
☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

USACM LIQUIDATING TRUST,

Plaintiff,

v.

TANAMERA RESORT PARTNERS, LLC,

Defendant.

Case Nos.:
BK-S-06-10725-LBR
BK-S-06-10726-LBR
BK-S-06-10727-LBR
BK-S-06-10728-LBR
BK-S-06-10729-LBR

JOINTLY ADMINISTERED
Chapter 11 Cases

Judge Linda B. Riegler

Adversary No. 08-01129

**MOTION SEEKING THE
APPROVAL OF THE
SETTLEMENT AGREEMENT
BETWEEN THE USACM
LIQUIDATING TRUST AND
TANAMERA RESORT
PARTNERS, LLC**

Hearing Date: June 12, 2009
Hearing Time: 9:30 a.m.

Geoffrey L. Berman, the trustee for the USACM Liquidating Trust (the "USACM Trustee"), hereby submits his Motion Seeking the Approval of the Settlement Agreement Between the USACM Liquidating Trust and Tanamera Resort Partners, LLC (the "Motion"), seeking entry of an order approving the Settlement Agreement and Release of Claims (the "Settlement Agreement") between the USACM Liquidating Trust (the "USACM Trust") and Tanamera Resort Partners, LLC ("TRP").

This Motion is based on the points and authorities listed herein, Rule¹ 9019, the Declaration of Geoffrey L. Berman in Support of the Motion Seeking the Approval of the Settlement Agreement Between the USACM Liquidating Trust and Tanamera Resort Partners, LLC (the "Berman Declaration") filed concurrently with this Motion, the pleadings, papers, and other records on file with the clerk of the above-captioned Court, judicial notice of which is hereby respectfully requested, and any argument an evidence presented to the Court at the time of the hearing of the Motion.

I. PERTINENT FACTS

1. On April 13, 2006 (the "Petition Date"), USA Commercial Mortgage Company ("USACM") filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the District of Nevada (the "Bankruptcy Court"), which bankruptcy case was jointly administered with several related cases under bankruptcy case number BK-S-06-10725-LBR (the "USACM Bankruptcy Case"). See Berman Declaration ¶ 4. The Bankruptcy Court confirmed the Third Amended Joint Chapter 11 Plan of Reorganization (the "Joint Plan") pursuant to an order entered on January 8, 2007 (the "Confirmation Order") and the Joint Plan became effective on March 12, 2007. See id. The USACM Trust was created pursuant to the Joint Plan and the Confirmation Order and Geoffrey L. Berman (the "USACM Trustee") serves as the trustee of the USACM Trust. See id. Pursuant to the terms of the Joint Plan and the Confirmation Order, the USACM

¹ Unless otherwise expressly stated herein, all references to Chapters or Sections shall refer to 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), and all Rule references shall refer to the Federal Rules of Bankruptcy Procedure, 1001-9036.

1 Trust now holds all potential pre- and post-petition claims and causes of action that USACM and
2 the USACM Trust may have or may at any time have had. See id.

3 2. On April 11, 2008, the USACM Trust commenced adversary proceeding number
4 08-01129, entitled *USACM Liquidating Trust v. Tanamera Resort Partners, LLC* (the “Pending
5 Litigation”) seeking to recover \$577,783.42 in USACM funds that USACM believed were
6 transferred to TRP prior to the Petition Date. See id. ¶ 5. The Trust has recently filed a Motion
7 for Leave to File an Amended Complaint removing one of the claims for \$100,000, thus making
8 total damages currently sought in the Pending Litigation equal \$477,783.42 (collectively, the
9 “TRP Transfers”). See Dkt. No. 27. The motion was granted by this Court, however, the parties
10 reached a verbal settlement agreement by the time of the Court’s order granting the motion;
11 therefore, the Amended Complaint has not been filed. See Dkt. No. 28. The USACM Trust
12 asserts that USACM received no benefit for the TRP Transfers, and that the TRP Transfers were
13 made in contravention of Bankruptcy Code sections 544 and 550, and section 112.180 of the
14 Nevada Revised Statutes. See Berman Affidavit ¶ 6. TRP has continuously denied any liability
15 for the TRP Transfers and has not conceded any of its defenses. See id.

16 3. The parties have engaged in substantial settlement negotiations to resolve the
17 Pending Litigation in an effort to minimize the costs of litigation and the extensive time that
18 must be dedicated to such a proceeding, and to avoid the risk inherent in proceeding to trial. See
19 id. ¶ 8. These settlement discussions, which have been at arm’s-length and in good faith, have
20 culminated in the Settlement Agreement. See id.

21 4. The Settlement Agreement provides in pertinent part as follows:

22 a. **Settlement Consideration.** TRP shall pay \$140,000 to the USACM Trust
23 upon the Effective Date of this Agreement.

24 b. **Effective Date.** As used herein, “Effective Date” means the first business
25 day which is eleven (11) days after entry of an order by the Bankruptcy
26 Court in the USACM Bankruptcy Case authorizing the USACM Trust to
27 enter into the Agreement (the “Approval Order”). Unless otherwise
28 ordered by a court, the Effective Date will occur on the first business day
which is more than ten (10) days after entry of the Approval Order
notwithstanding any pending appeal commenced by one of the Parties or
any third-party. If any stay is imposed as to the effectiveness of this
Agreement as a result of an appeal, upon written notification to the other

Parties, either Party may deem this agreement void and nonbinding on the Parties.

c. **Releases.**

Release of Claims by the USACM Trust. Upon the Effective Date, the USACM Trust fully releases and discharges TRP and all of its present and former principals, members, employees (in both their corporate and individual capacities), staff, predecessors, successors, subsidiaries, contractors, managers, affiliates, and respective attorneys, consultants, adjustors and insurers (“TRP Released Parties”) in their capacities as such, from any and all, known or unknown, claims, demands, damages, liabilities, actions, causes of action or suits at law or in equity arising out of or related to the TRP Transfers, the allegations in the Pending Litigation and the business or financial relationship of USACM to the TRP Released Parties. This release relates only to claims that the USACM Trust has or had and specifically does not include claims of other entities, including, without limitation, USA Investment Partners, LLP. This release includes all claims that the USACM Trust ever had or now has against TRP relating to the TRP Transfers, provided, however, that the USACM Trust does not release TRP from any obligations created under this Agreement (the “USACM Released Claims”).

Release of Claims by TRP. Upon the Effective Date, TRP, on behalf of all of its present and former principals, employees (in both their corporate and individual capacities), staff, predecessors, successors, subsidiaries, contractors, managers, affiliates, and respective attorneys, consultants, adjustors and insurers in their capacities as such, fully releases and discharges USACM, the USACM Trust, the USACM Trustee, and all of their present and former trustees, managers, employees, agents, consultants, attorneys, directors, and officers, and their respective insurers in their capacities as such from any and all, known or unknown, claims, demands, damages, liabilities, actions, causes of action or suits at law or in equity arising out of or related to the TRP Transfers, the allegations in the Pending Litigation, and the business or financial relationship of USACM to the TRP Released Parties. This release includes all claims that TRP ever had or now has against the USACM, the USACM Trust, and the USACM Trustee, relating to the TRP Transfers, provided, however, that TRP does not release USACM, the USACM Trust, and the USACM Trustee from their obligations created under this Agreement (the “TRP Released Claims”).

See Settlement Agreement, attached as Exhibit "A" to the Berman Declaration.

I. **LEGAL ARGUMENT**

The Joint Plan does not expressly require Bankruptcy Court to approve proposed settlements. Rather, the Joint Plan provides that the USACM Trust shall have the discretion to:

1 commence, prosecute, defend against, recover on account of, and
 2 settle all rights, Claims, causes of action, defenses, and
 3 counterclaims in their sole discretion in accordance with what is
 in the best interests, and for the benefit, of the Debtors or the
 Post-Effective Date Entities.

4 Joint Plan, pps. 47-48, 59. In an abundance of caution, and as required by the Settlement
 5 Agreement, the USACM Trust seeks the Bankruptcy Court's approval of the Settlement
 6 Agreement pursuant to Bankruptcy Rule 9019 and notes that compromise and settlement
 7 agreements have long been an inherent component of the bankruptcy process. See Protective
 8 Comm. for Index Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414, 424 (1958)
 9 (citing Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939)).

10 Bankruptcy Rule 9019(a) that governs the approval of settlement agreements in
 11 bankruptcy proceedings, provides that "[on] motion by the trustee and after notice and a hearing,
 12 the court may approve a compromise or settlement. Notice shall be given to creditors, the United
 13 States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity
 14 as the court may direct." Fed. R. Bankr. P. 9019(a).

15 Pursuant to this rule, compromises are favored in bankruptcy; therefore, the decision of
 16 the bankruptcy judge to approve or disapprove the compromise of the parties rests in his or her
 17 sound discretion. See In re Stein, 236 B.R. 34, 37 (Bankr. D. Or. 1999). The law favors
 18 compromise "as long as the bankruptcy court amply considered the various factors that
 19 determined the reasonableness of the compromise." In re A&C Properties, 784 F.2d 1377, 1381
 20 (9th Cir. 1986). Public policy favors pretrial compromises because litigation "can occupy a
 21 court's docket for years on end, depleting resources of the parties and the taxpayers while
 22 rendering meaningful relief elusive." In re Grau, 267 B.R. 896, 899 (Bankr. S.D.Fla 2001),
 23 quoting Matter of Munford, Inc., 97 F.3d 449, 455 (11th Cir. 1996).

24 The United States Supreme Court has expressed that a bankruptcy settlement must be fair
 25 and equitable. See Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v.
 26 Anderson, 390 U.S. 414 (1968). The Ninth Circuit Court of Appeals has enunciated that "in
 27 order to determine whether a proposed settlement is fair and equitable, the bankruptcy court must
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1 consider four factors: (a) the probability of success in the litigation; (b) the difficulties, if any, to
 2 be encountered in the matter of collection; (c) the complexity of the litigation involved, and the
 3 expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the
 4 creditors and a proper deference to their reasonable views in the premises.” See In re Stein, 236
 5 B.R. at 37; see also In re A&C Properties, 784 F.2d at 1381; Schmitt v. Ulrich, 215 B.R. 417,
 6 421 (B.A.P. 9th Cir. 1997). The debtor is not necessarily required to satisfy each of these factors
 7 as long as the factors as a whole favor approving the settlement. See In re Pacific Gas and
 8 Electric Co., 304 B.R. 395, 416 (Bankr. N.D. Cal. 2004); In re WCI Cable, Inc., 282 B.R. 457,
 9 473-74 (Bankr. D. Or. 2002).

10 However, the settlement does not have to be the best the debtor could have possibly
 11 obtained; rather, the settlement must only fall “within the reasonable range of litigation
 12 possibilities.” See In re Adelphia Comm. Corp., 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005)
 13 (citing In re Penn Cent. Transp. Co., 596 F.2d 1102, 1114 (3d Cir. 1979) (“Indeed, a court may
 14 approve a settlement even if it believes that the Trustee ultimately would be successful.” Id.).

15 There is a range of reasonableness with respect to a settlement—a range
 16 which recognizes the uncertainties of law and fact in any particular case
 17 and the concomitant risks and costs necessarily inherent in taking any
 litigation to completion—and the judge will not be reversed if the
 appellate court concludes that the settlement lies with that range.

18 See id. (citing Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972)). The bankruptcy court “need
 19 not conduct an independent investigation into the reasonableness of the settlement but must only
 20 ‘canvass the issues and see whether the settlement falls below the lowest point in the range of
 21 reasonableness.’” See id. (citing In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983)); see
 22 also Ars Brook, LLC v. Jalbert (In re Servisense.com, Inc.), 382 F.3d 68, 71-72 (1st Cir. 2004);
 23 In re Energy Cooperative, Inc., 886 F.2d 921, 929 (7th Cir. 1989); New Concept Housing, Inc. v.
 24 Poindexter et al. (In re New Concept Housing, Inc.), 951 F.2d 932, 938 (8th Cir. 1991).

25 It is evident that the proposed Settlement Agreement surpasses this standard and is fair
 26 and reasonable and in the best interest of the estate’s creditors. See Berman Declaration ¶ 10.
 27 First, TRP has asserted several defenses to USACM’s claims, has continuously and strenuously
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1 denied any liability arising out of the TRP Transfers, and has made no indication that it will
2 concede any of its defenses. See id. ¶ 6. Thus, the USACM Trust's success is not if this matter
3 was fully litigated. See id.

4 Second, the proposed Settlement Agreement represents that culmination of arm's-length
5 negotiations undertaken with an appreciation of the extensive time and expense required to try
6 the issues necessary for the Court to render a determination that TRP Transfers were fraudulent.
7 See id. This is particularly true as the parties have reached this compromise prior to having
8 undertaken any depositions or having retained any experts. See id. ¶ 7. The expense,
9 inconvenience, and delay inherent in any adversary proceeding undertaken to resolve the
10 Pending Litigation weighs heavily in favor of approval of the Settlement Agreement. See id. ¶ 9.

11 Third, the paramount interest of creditors which the Court must consider in deciding
12 whether to approve a proposed compromise generally "reflects not only the desire of creditors to
13 obtain the maximum possible recovery but also their competing desire that that recovery occur in
14 the least amount of time." In re Marples, 266 B.R. 202, 207 (Bankr. D. Idaho 2001). The
15 USACM Trustee contends that the probability of success is outweighed by the costs and inherent
16 delays to be incurred in taking the Pending Litigation to trial. See Berman Declaration ¶ 9.
17 After a thorough evaluation of all available information, the USACM Trustee has determined
18 that approval of the Settlement Agreement is fair and equitable and in the best interest of the
19 USACM Trust's creditors because it efficiently alleviates an ongoing dispute and eliminates
20 potential subsequent liability to the USACM Trust. See id. ¶ 10.

21 Fourth, TRP has indicated on several occasions that due to the recession in the
22 construction and real estate industry, it does not have the funds to pay a judgment if one was
23 rendered against it in the Pending Litigation. See id. ¶ 6. Therefore, there is a real chance that
24 such judgment could not be collected even if judgment was obtained against TRP. See id.

25 Finally, the USACM Trustee believes that the proposed Settlement Agreement falls
26 within a reasonable range of likely outcomes of the Pending Litigation, after accounting for
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1 litigation risks, costs, and delay associated with trial, appeal and ultimately, if successful,
2 collection of any judgment awarded. See id. ¶ 11. The proposed Settlement Agreement also will
3 not result in any negative impact on any third parties.

4 WHEREFORE, the USACM Trustee respectfully requests that this Court grant this
5 Motion, thereby approving the proposed Settlement Agreement and for such other and further
6 relief as the Court deems just and proper.

7 DATED this 20th day of May, 2009.

8 **DIAMOND MCCARTHY LLP**

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9 By: /s/ Eric D. Madden
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Counsel for USACM Liquidating Trust

15 *Special Litigation Counsel for*
16 *USACM Liquidating Trust*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of DIAMOND MCCARTHY LLP,
and that on the 21st day of May 2009, I served a true and correct copy of the foregoing
**MOTION SEEKING THE APPROVAL OF THE SETTLEMENT AGREEMENT
BETWEEN THE USACM LIQUIDATING TRUST AND TANAMERA RESORT
PARTNERS, LLC** by electronic transmission to counsel for Tanamera, Leigh Goddard, at
lgoddard@mcdonaldcarano.com.

/s/ Catherine A. Burrow, CLA
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